Supreme Court, U.S.
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No. 85-1792

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,

Petitioner,

v.

RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit Before Judgment

BRIEF IN OPPOSITION

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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether a rail labor union, engaged in a dispute with a small, geographically isolated rail carrier, may lawfully employ secondary picketing at the facilities of all other carriers across the nation with which it has no dispute, thereby effectively halting interstate rail traffic, in an effort to bring pressure to bear on the struck railroad.

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BRIEF IN OPPOSITION

The Brotherhood of Maintenance of Way Employes [hereinafter, "BMWE"], has asked this Court to grant expedited consideration and argument on Petitions for Writs of Certiorari to the United States Court of Appeals for the Fourth and Seventh Circuits Before Judgment. Richmond, Fredericksburg & Potomac

Railroad Company[1] [hereinafter, "RF&P"] is the respondent to the Petition filed in Record No. 85-1792. That case is presently pending before the United States Court of Appeals for the Fourth Circuit.

The controversy between the BMWE and RF&P arises out of picketing of RF&P's railyard facilities in Alexandria, Virginia and Richmond, Virginia by Maine Central Railroad employees who are members of the BMWE. RF&P has no dispute of any kind with the BMWE or any of its members. The BMWE is presently striking the Maine Central Railroad and the Portland Terminal Company [hereinafter, "MEC" and "PT"], and has been since early March, 1986. There is no connection of any kind between RF&P and MEC or PT. Indeed, the United States District Court for the Eastern District of Virginia, by the Honorable Albert V. Bryan, Jr., found that the RF&P was a "neutral" in the dispute between BMWE and the MEC and PT.

Despite the fact that the RF&P has provided no assistance to the MEC and PT in the dispute since the institution of the strike by BMWE, that union sent picketers to the Alexandria facilities on April 4, 1986, and to the Richmond facilities on April 9, 1986. RF&P unsuccessfully sought injunctions from the District Court to prohibit that picketing.

On April 11, 1986, RF&P filed a Motion for Injunction Pending Appeal pursuant to FED.R.APP.P.

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[1] RF&P is controlled by CSX Corporation through its ownership of the Chesapeake & Ohio Railroad, the Baltimore & Ohio Railroad and Seaboard Railroads which together control Richmond - Washington Company which in turn owns 60% of the voting stock in RF&P.

8. Since the Court of Appeals was in recess, RF&P was granted a hearing before a single circuit judge, the Honorable H. Emory Widener, Jr., who heard the matter in chambers in Abingdon, Virginia on April 12, 1986. At that time Judge Widener issued an Order granting the injunction sought by the RF&P. The Motion for Expedited Appeal was also granted. Agrument on the merits of the appeal was heard before a three-judge panel of the Court of Appeals on May 5, 1986.

Subsequent to that hearing, and on that date, by a vote of 2 to 1, Judge Widener dissenting, the panel dissolved the injunction pending appeal Judge Widener had entered on April 12. As yet, the panel has issued no decision on the merits of the controversy.

On May 7, 1986, RF&P filed a Suggestion for a Rehearing in Banc. (Copy attached as Attachment A). On May 9, 1986, RF&P filed Appellant's Motion to Reinstate Injunction Pending Appeal. (Copy attached as Attachment B). It is expected that the Court of Appeals will rule upon these motions during the week of May 12, 1986.

Subsequent to the dissolution of the injunction, on May 8, the BMWE posted pickets at the Alexandria and Richmond facilities. As a result, all but a few of RF&P's union employees, approximately 350 in Alexandria and approximately 300 in Richmond, have refused to cross the picket lines, resulting in a severe disruption of RF&P's ability to service north-south traffic along the eastern seaboard. RF&P is a major "bridge-carrier," and is the primary link between the Northeast and the South of the United States. At its Alexandria facilities, the RF&P serves Conrail, Baltimore & Ohio Railroad, Chesapeake & Ohio Railroad,

Southern Railway Company and Delaware & Hudson Railroad.

As a result of the work stoppage, RF&P is unable fully to meet its obligations to provide "safe and adequate" transportation service "on reasonable requests" as required by the Interstate Commerce Act, 49 U.S.C § 10101(a). As time passes, RF&P's ability to meet its obligations will become more difficult, resulting in a loss of business, some of which has already occurred. Under these circumstances, a carrier may be liable to a third party in a federal damage action for the breach of this duty even when it is beset by labor controversies. *Brotherhood of Railway Clerks v. Florida East Coast Railway*, 384 U.S. 238, 245 (1966). Both the Seventh and Eighth Circuit Courts of Appeal have recognized that the duties imposed by the Interstate Commerce Act create a corresponding federal right to relief from unprivileged interference with the carrier's performance of these rights. *Ashley, Drew & Northern Ry. v. United Transportation Union*, 625 F.2d 1357 (1980); *Toledo, P. & W. Railroad v. Brotherhood of Railroad Trainmen*, 132 F.2d 265 (7th Cir. 1942), *rev'd on other grounds*, 321 U.S. 50 (1944). The actions by the BMWE also violate the clear mandate of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, which has as one of its primary purposes, the prevention of "interruption to commerce".

BMWE takes the position that because it has a local dispute with a Maine railroad that it may picket any railroad in the United States, relying on *Jacksonville Bulk Terminals, Inc. v. ILA*, 457 U.S. 702 (1982). This argument is contrary to twenty years of jurisprudence accommodating the Norris-LaGuardia Act,

29 U.S.C. § 101 *et seq.*, to the Railway Labor Act and the Interstate Commerce Act. All the reported decisions of the various courts of appeal have adopted or applied the "substantial alignment" test, which requires that a railroad aid or "align" itself with the struck railroad before the union may picket without fear of injunction. *See, e.g., Ashley, Drew & Northern Ry. v. UTU, supra; Brotherhood of Railway Trainmen v. Atlantic Coastline R.R.*, 362 F.2d 649 (5th Cir.), *aff'd by an equally divided court*, 385 U.S. 20 (1960). *Jacksonville Bulk*, upon which BMWE relies, did not address the issue of secondary picketing, nor did it involve the mandates of the Railway Labor Act and the Interstate Commerce Act. The case dealt only with the motivation for a dispute—not whether a dispute exists at all.

It is RF&P's position that this matter should be disposed of first by the Court of Appeals in banc. If the Court of Appeals fails to grant RF&P's suggestion, or alternatively fails to grant it an injunction pending appeal to this Court, RF&P would concur with the BMWE's Motion for Expedited Consideration. It cannot be disputed that the issues presented by this controversy are of national importance. Railroads across the United States have been affected by BMWE's position that it is entitled to picket any railroad in the United States if it has a local dispute somewhere. Railroads affected to date include RF&P, Burlington Northern Railroad Company, Union Pacific Railroad Company, Missouri Pacific Railroad Company, Atchison, Topeka & Sante Fe Railway Company, Baltimore & Ohio Railroad Company, Baltimore & Ohio Chicago Terminal Railroad Company, Chesapeake & Ohio Railway Company, Seaboard System

Railroad, Inc., Norfolk & Western Railway, Southern Railway, Delaware & Hudson Railway, Boston & Maine Railroad Company, as well as the struck railroads, the MEC and PT. All of the railroads that have been found neutral, other than RF&P, so far have been protected by injunction.

BMWE seeks to reverse twenty years of decisions and impose a severe and unwarranted hardship on the railroad industry. Undoubtedly, this Court should ultimately resolve these issues. RF&P believes that they first should be considered and determined by the Court of Appeals in banc.

Respectfully submitted,

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ATTACHMENT A

***Richmond, Fredericksburg & Potomac Railroad Company v. Brotherhood of Maintenance of Way Employes*, C.A. No. 86-3544, United States Court of Appeals for the Fourth Circuit, Appellant's Suggestion for Rehearing in Banc**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RECORD NO. 86-3544

RICHMOND, FREDERICKSBURG,
& POTOMAC RAILROAD COMPANY,

Appellant,

v.

BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYES,

Appellee.

SUGGESTION FOR REHEARING IN BANC

PRELIMINARY STATEMENT

Richmond, Fredericksburg & Potomac Railroad Company (RF&P), by counsel, pursuant to FED.R.APP.P. 27 and 35(a)(2), hereby suggests that the Court of Appeals for the Fourth Circuit rehear in banc argument relating to the Motion for Dissolution of Injunction Pending Appeal filed by the Brotherhood of Maintenance of Way Employes (BMWE).

On April 12, 1986, the Honorable H. Emory Widener, Jr., sitting as a single judge because of an emergency in the railroad industry issued an injunction pending appeal (copy attached) prohibiting the BMWE from picketing or otherwise interfering with the operations of the RF&P at its facilities in Potomac Yard, Alexandria and its Richmond facilities pending the appeal of denial of motions for preliminary injunctions on April 4 and 10, 1986 by the United States District Court for the Eastern District of Virginia, Alexandria Division (by the Honorable Albert V. Bryan, Jr.)

On May 5, 1986, after argument on the merits of the appeal and upon the Motion for Dissolution of Injunction Pending Appeal, in a two to one decision, Judges Hall and Murnaghan with Judge Widener dissenting, ordered the dissolution of the injunction entered by Judge Widener on April 12. Because this proceeding involves a question of exceptional national importance, RF&P asks that the court rehear in banc the Motion for Dissolution of Injunction Pending Appeal.

RF&P notes that an appellee railroad in a nearly identical case pending before this Court has filed a Motion for Expedited In Banc Hearing, in *Norfolk and Western Railway Co. v. Brotherhood of Maintenance of Way Employes,* Record No. 86-3555.

ARGUMENT AND AUTHORITIES

I. THE PANEL DECISION IS CONTRARY TO ALL REPORTED AUTHORITY AND WILL RESULT IN A SERIOUS AND IRREPARABLE INJURY TO RF&P AND OTHER INNOCENT PARTIES

A. RF&P And Other Neutral Parties Will Be Irreparably Harmed If Picketing Is Permitted.

The split decision by the panel has necessarily resulted in a ruling on the merits of the appeal. *Cf. Bailey v. Willeford,* 131 F. 242 (4th Cir. 1904). By dissolving the injunction issued by Judge Widener, the panel is permitting the picketing to recommence necessarily resulting in a severe curtailment of RF&P's ability to serve interstate commerce, and placing RF&P in jeopardy of violating its responsibilities to other rail carriers under the Interstate Commerce Act, 49 U.S.C. § 11101 (1978).

While the panel has issued no ruling on the merits of the case, the position taken by the BMWE in its papers and upon oral argument was that the federal judiciary is deprived of jurisdiction to issue an injunction in this dis-

pute by the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.* (1932, as amended). Apparently having adopted this reasoning, the effect of the panel decision is to permit the BMWE or any other union engaged in a purely local dispute with a local railroad to picket railroads throughout the entire United States without restraint.

The prejudicial consequences of this result can be no where more clearly seen than through the impact upon the RF&P. BMWE is engaged in a labor dispute with the Maine Central Railroad and Portland Terminal Company in the state of Maine. Maine Central connects in New England with the Boston & Maine Railroad. The Boston & Maine in turn connects with the Delaware and Hudson Railroad which has trackage rights into Potomac Yard in Alexandria. Thus, RF&P has no relationship of any kind and provides no services for the primary roads in Maine.

As a result of the picketing that occurred until Judge Widener issued the injunction of April 12, RF&P estimated that it had a daily revenue loss in excess of $117,000. RF&P employees refused to cross the picket line. The picketing also caused irreparable harm to Potomac Yard and RF&P's plant, rolling stock and maintenance programs. Potomac Yard is currently engaged in a $7,800,000 construction project to modernize and reconfigure its freight car classification facilities and a $1,000,000 computerization project. Every day of delay in the completion of those projects between now and the anticipated completion date results in substantially increased project costs. For every day of picketing, the project is set back by approximately 3 days. (Jt. App. at 38).

The picketing at Potomac Yard will cause RF&P employees, who have no dispute of any kind with RF&P, to lose $1,600,000 per month in wages. Moreover, RF&P will not be able to provide service to companies relying upon it for shipping between its facilities in Richmond and Alexandria. On the other hand, BMWE has never presented

any facts upon which a court could find that it would be harmed if an injunction is effective pending appeal.

B. The Panel Decision Is Contrary To Twenty Years Of Uniform Decisions And Conflicts With Decisions Of Other Circuits.

The split decision of the panel is unprecedented in labor law jurisprudence and particularly in the transportation industry. For generations the railroad industry has been governed by a *sui generis* labor law, culminating in 1932 in the Railway Labor Act, 45 U.S.C. § 151 *et seq.* BMWE has taken the position that while secondary picketing is outlawed and enjoinable through the auspices of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), such a provision was not included in the Railway Labor Act and thus the picketing here is "not regulated" and thus cannot be enjoined. That position has not been the law for more than forty years. During the debates resulting in the Taft-Hartley Act amendments to the NLRA which outlawed secondary picketing, Senator Taft specifically stated that a provision outlawing secondary boycotting was not needed in the Railway Labor Act because that Act had always had its own procedures and there had been "no abuses which had arisen in connection with the operation of the Railway Labor Act". 93 Cong. Rec. 6498, 2 Legislative History of the Labor Management Relations Act, 1947, p. 1571. *See discussion* in *Brotherhood of Railway Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 376, n. 10 (1969).

Facing the issues presented by this appeal, the courts have for 20 years held secondary picketing of neutral railroads unlawful and enjoinable despite the prohibitions of the Norris-LaGuardia Act. It is only when a railroad has substantially aligned itself with the primary employer that a union may extend its picketing to the secondary railroad. This test was first adopted by the Court of Appeals for the Fifth Circuit in *Brotherhood of Railroad Trainmen v.*

Atlantic Coastline Railroad Co., 362 F.2d 649 (5th Cir.), *aff'd. by an equally divided court*, 385 U.S. 20 (1966). Three years later the Supreme Court decided *Brotherhood of Railway Trainmen v. Jacksonville Terminal Co., supra*, at p. 4. While the primary holding in that case was that state law was preempted, the Court went to great lengths to find that the Jacksonville Terminal was an "integral part of the day-to-day operations" of one of the owners of the terminal, Florida East Coast Railroad, the primary employer subject to the strike.

Since the *Jacksonville Terminal* and *Atlantic Coast Line* decisions, the reported cases have unanimously held that a neutral railroad cannot be picketed absent the showing of substantial alignment. *See Ashley, Drew & Northern Ry. Co. v. United Transportation Union*, 625 F.2d 1357 (8th Cir. 1980); *Western Maryland RR Co. v. System Board*, 465 F. Supp. 963 (D. Md. 1979); *Southern Railway Co. V. BRAC*, 99 LRRM 2608 (W.D. NY 1978), *Terminal Railroad of St. Louis v. BRAC*, 458 F. Supp. 100 (E.D. Mo. 1978). There is no reported decision of any court that supports the position taken by the BMWE in this case. The 2 to 1 decision by the panel here is directly contrary to the decisions of the Fifth and Eighth Circuits in *Atlantic Coastline, supra* and *Ashley Drew, Supra.*, and, to the knowledge of counsel this inconsistency was not explained by the panel in its decision to dissolve the injunction pending appeal.

Several lower court decisions arising out of the same illegal activity taken by the BMWE against RF&P here have demonstrated the continuing vitality of the substantial alignment doctrine. *See e.g. Burlington Northern v. BMWE*, No. 86-C-442 (N.D.Ill. April 24, 1986); *Consolidated Rail Corp. v. BMWE*, No. 86-0318T (W.D.N.Y. April 6, 1986); *Norfolk & Western Railway Co., et al. v. BMWE*, No. 86-0191-R (W.D.Va. April 22, 1986). The decision issued by the Honorable Harold H. Greene of the United States District Court for the District of Columbia is not

to the contrary. In that decision, Judge Greene specifically found alignment between the complaining railroad and the struck railroads in Maine. *See Central Vermont Railway, Inc. v. BMWE*, No. 86-0951 (D.C.C., April 25, 1986, at p. 7, n.7 and p. 17, n.17).

C. Jacksonville Bulk Did Not Overrule Twenty Years of Uniform Precedent.

While the split panel here has yet to issue its decision on the merits, BMWE has argued that the decision of the Supreme Court in *Jacksonville Bulk Terminals v. Longshoreman*, 455 U.S. 702 (1982), obliterated the twenty-year old requirement for substantial alignment in the railroad industry. The Supreme Court did not have the issue of secondary picketing before it in that case and never addressed it; nor did it address the twenty years of history in the railroad industry requiring substantial alignment. The only holding in that decision is that a politically motivated strike cannot be enjoined under the auspices of the Norris-LaGuardia Act.[1]

D. Federal Courts Have Jurisdiction to Enjoin This Conduct.

Lastly, it is possible that the panel, rather than relying on the proscriptions of Norris-LaGuardia, found that a federal court lacked jurisdiction to issue an injunction in the first instance. If that is the basis of the decision, it is in direct conflict with decisions of the Fifth, Seventh and Eighth Circuit Courts of Appeal. A district court as well as this court plainly has jurisdiction to issue an injunction under the Interstate Commerce Act, *supra*, *see Toledo P&W.R. v. Brotherhood of R.R. Trainmen*, 132 F.2d 265 (7th Cir. 1942), *rev'd on other grounds, 321 U.S. 50 (1944);*

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[1] Similarly, *Smith Management Corp. v. IBEW*, 737 F.2d 788 (9th Cir. 1984), involved a non-railroad industry employer. Moreover, there, the picketed employer was a direct beneficiary of the work involved in the primary labor dispute and was not three or four times removed from it as RF&P is in Alexandria and Richmond.

Ashley, Drew, supra; *Atlantic Coastline Railroad, supra.*, or under the Railway Labor Act. *See Burlington Northern v. BMWE, supra* at 6.

CONCLUSION

The 2 to 1 decision dissolving the injunction issued by Judge Widener will have an immediate impact upon the commerce of the United States because it will result in a severe curtailment of the operations of the RF&P, a major bridge carrier from north to south. Potomac Yard serves six railroads including Conrail and the Southern Railway Company, two of the nation's major rail carriers. Their operations similarly will be substantially and deleteriously affected. The issue involved is one of exceptional importance not only to the RF&P, but to the railroad industry and the nation. Indeed, BMWE itself has stated that these issues are "crucial" to it and to the "rail industry". *See* Petition for a Writ of Certiorari Prior to Judgment, filed by the BMWE on May 1, 1986.

For the reasons stated, RF&P asks this Court in banc to rehear this matter as expeditiously as possible. Alternatively, RF&P requests that this Court stay the decision of the panel dissolving the injunction pending review by the Supreme Court of the United States.

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ATTACHMENT B

Richmond, Fredericksburg & Potomac Railroad Company v. Brotherhood of Maintenance of Way Employes, C.A. No. 86-3544, United States Court of Appeals for the Fourth Circuit, Appellant's Motion to Reinstate Injunction Pending Appeal

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RECORD NO. 86-3544

RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY,

Appellant,

v.

BROTHERHOOD OF MAINTENACE OF WAY EMPLOYES,

Appellee.

APPELLANT'S MOTION TO REINSTATE INJUNCTION PENDING APPEAL

TO: The Honorable H. Emory Widener, Jr., Circuit Judge
The Honorable Kenneth K. Hall, Circuit Judge
The Honorable Francis D. Murnaghan, Jr., Circuit Judge

Appellant Richmond, Fredericksburg & Potomac Railroad Company (RF&P), by counsel, moves the Court to reinstate the injunction pending appeal heretofore granted by Judge Widener on April 12, 1986, and dissolved by order of the panel on May 5, 1986, and in support thereof states as follows:

1. Eleven of the largest railroads in the country now enjoy preliminary injunctive protection from picketing by members of BMWE on strike against the Maine Central Railroad.[1] As a result, the RF&P is the only non-Guilford

[1] These railroads are Norfolk and Western Railroad Company, Southern Railway Company, Consolidated Rail Corporation, Burlington Northern Railroad Company, Union Pacific Railroad Company, Missouri Pacific Railroad Company, The Atchison, To-

System railroad in the country now being picketed by BMWE (except for the Central Vermont railroad which directly serves the strike-bound railroad as found the United States District Court for the District of Columbia in *Central Vermont Railway, Inc. v. BMWE*, CA No. 86-1141, at footnotes 7 and 17).

2. In a well-reasoned decision, which survived two reviews by the Supreme Court, the Seventh Circuit specifically held that the Norris-LaGuardia Act does not prohibit the granting of an injunction to maintain the status quo pending resolution of the jurisdictional issues presented by the appeal. *Chicago & N.W.R. Co. v. United Transportation Union*, 422 F.2d 979, 982-85 (7th Cir. 1970), *rev'd on other grounds*, 402 U.S. 570 (1971), *on remand*, 336 F. Supp. 1149 (1971), *rev'd on other grounds*, 471 F.2d 366, 367-68 (7th Cir. 1972), *cert. denied*, 410 U.S. 917 (1973).

> . . .In the absence of a specific Congressional directive, we strike the balance in favor of maintaining the status quo to allow time for a meaningful judicial review.

422 F.2d at 985. That court also relied in part on a concurring opinion of Justice Frankfurther in *United States v. United Mine Workers*, 330 U.S. 258 (1947):

> To suggest that the right to determine so complicated and novel an issue could not be brought within the cognizance of the district court, *and eventually of this Court*, is to deny the place of the judiciary in our scheme of government. 330 U.S. at 310. (Emphasis supplied)

422 F.2d at 985.

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peka and Santa Fe Railway Company, The Baltimore and Ohio Railroad Company, The Baltimore and Ohio Chicago Terminal Railroad Company, The Chesapeake and Ohio Railway Company, and Seaboard System Railroad, Inc.

3. The panel should be aware that Justice Marshall last week denied BMWE's motion to dissolve the preliminary injunction issued by the United States District Court for the Western District of New York in *Conrail v. BMWE*, following the denial of a similar motion to the Second Circuit on April 22, 1986, 2d Cir. No. 86-7289.

4. In the present posture of the case, RF&P is being picketed at all of its facilities to its irreperable harm should the jurisdictional issue be decided adversely to the appellee BMWE by the panel, by the Court in banc, or by the Supreme Court. The union is adequately protected by the surety bond posted by RF&P in this Court. Fundamental fairness requires that RF&P be afforded the same "status quo" protection pending appeal as that granted to all of the similarly situated railroads throughout the country.

May 9, 1986

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& Potomac Railroad Company

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